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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

December 16, 1994

HAND DELIVERED

William E. Kennard, Esquire
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

Re: Request for Clarification of "Multiplier" Rule as
Applied to Disclosure Requirements under Section
24.813 of the Commission's Rules, 47 C.F.R.
§24.813, GEN Docket No. 90-314, and Spectrum Caps,
PP Docket No. 93-253

Dear Mr. Kennard:

In the GEN Docket No. 90-314 proceeding captioned above, certain limited partnerships affiliated with the Morgan Stanley Group, Inc. (the "Morgan Stanley Partnerships") filed petitions (the "Morgan Stanley Filings") seeking reconsideration of the Commission's "multiplier" rule, as it is applied to entities holding indirect ownership interests in broadband and narrowband personal communications services ("PCS") licensees.^{1/} These petitions sought relief for insulated limited partners from the attribution rules, a higher attribution threshold for institutional investors, and certain other modifications to the Commission's rules.

^{1/} See Petition for Reconsideration in GEN Docket No. 90-314, filed September 6, 1994; Letter dated October 5, 1994 (GEN Docket No. 90-314; ET Docket No. 92-100) from Phillip L. Spector to William Caton; Petition for Reconsideration and Clarification in GEN Docket No. 90-314, ET Docket No. 92-100, filed October 7, 1994; and Letter dated October 20, 1994 (GEN Docket No. 90-314; ET Docket No. 92-100) from Phillip L. Spector to William Caton (together, the "Morgan Stanley Filings").

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We respectfully submit this ex parte letter in support of the Morgan Stanley Filings and to request additional clarification.^{2/} As discussed in more detail below, we advocate that the reach of the multiplier be limited to include only those holders of indirect interests in a PCS applicant who either (i) hold a majority of the ownership interests or other direct controlling interest in a holder of a direct attributable interest in the applicant or (ii) have a direct attributable interest in an entity holding a direct controlling interest in the applicant.

I. INTRODUCTION

Sections 24.204, 24.229(c), 20.6(e) and 24.710 of the Commission's Rules all limit the amount of relevant Commercial Mobile Radio Service ("CMRS") spectrum in which a single person or entity can have an "attributable" interest, as determined pursuant to Section 24.204(d) of the Rules. In the Further Order on Reconsideration, GEN Docket No. 90-314 (rel. July 22, 1994), the Commission indicated that it would apply the "multiplier" to determine whether an entity holding indirect non-controlling interests in a cellular licensee or PCS applicant has an attributable interest for purposes of the PCS/cellular cross-ownership rule and PCS spectrum cap rule.

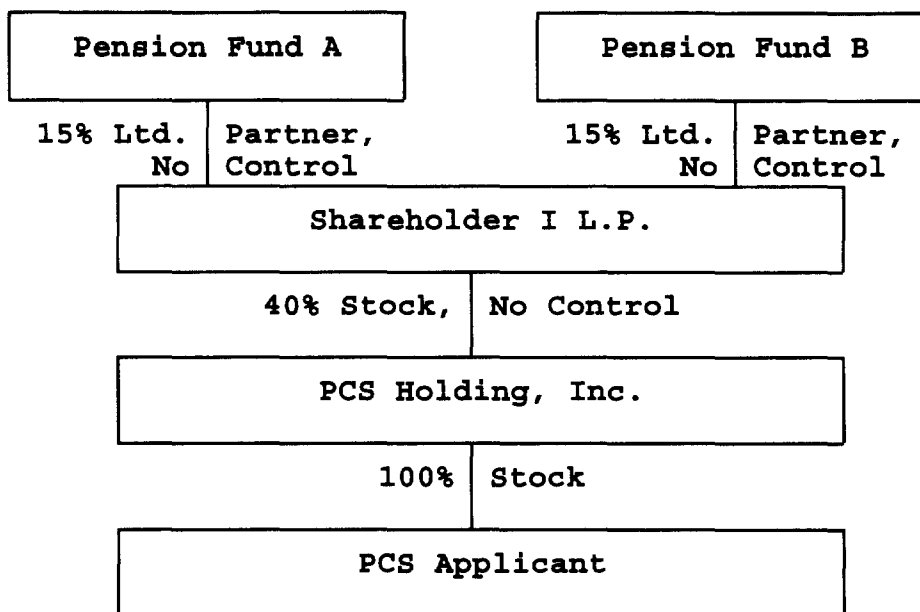
Section 24.813(a)(1) of the Commission's Rules requires a list of subsidiaries (i.e., any business five percent or more of whose stock, warrants, options or debt securities are owned by the relevant party) of each "attributable stockholder" of each broadband PCS applicant. Section 24.813(a)(2) requires a list of affiliates (i.e., any entity in which a five percent or more interest is held by the relevant party) of each party holding a five percent or greater interest in the broadband PCS applicant. In the Fourth Memorandum Opinion and Order, PP Docket No. 93-253, rel. October 19, 1994 ("Fourth Order"), the Commission clarified that "attributable" shareholder means a shareholder that holds a five percent or greater interest in a bidder or holds an attributable interest in a bidder through the operation of the multiplier. Fourth Order at para. 58 n. 123. The result is that not only shareholders in the applicant, but also holders of interests in these shareholders - even entirely passive interests or interests that result in no control over applicant - will be required to provide information about other companies in which they

^{2/} The Commission has stated that, in order to facilitate a free flow of information between applicants and Commission staff, proceedings involving auction applicants are exempt from the ex parte prohibitions that generally pertain to restricted proceedings. See Public Notice, FCC 94-283, released November 7, 1994.

have a five percent or greater interest.^{3/} These same persons and entities are also subject to spectrum caps because of indirect ownership interests over which they have no control and, in some cases, of which they have no knowledge. As described in the Morgan Stanley Filings, indiscriminate application of the multiplier will impose enormous reporting requirements on large pension funds and similar institutions that do not - and probably could not - keep track of each one of their indirect investments, and cause them to run the risk of inadvertent violation of the cross-ownership and spectrum aggregation restrictions. They correctly assert that such far-reaching application of the attribution rules will discourage investment in PCS by large institutions with complex holdings.

We reiterate the enormity of the reporting requirement and the chilling effect on PCS investment caused by an unchecked application of the multiplier. Consider the following hypothetical. PCS Applicant is wholly-owned by PCS Holding, Inc., which in turn has seven shareholders with an interest of five percent or greater. One of these shareholders, Shareholder I L.P., holds forty percent of the stock of PCS Holding, Inc. and has two limited partners whose indirect interests in PCS Applicant, through the use of the multiplier, may be five percent or greater. Each such limited partner, however, is a pension fund, with assets in excess of \$40 billion, that has no influence or control over its indirect investments, and whose investments change from day to day. This ownership structure is depicted graphically as follows:

^{3/} In the Order, PP Docket No. 93-253, rel. October 25, 1994, the Commission waived the information disclosure requirement of Sections 24.813(a)(1) and (a)(2) with respect to outside ownership interests of attributable stockholders, "except that direct, attributable ownership interests in other Commercial Mobile Radio Service licensees or applicants shall be disclosed." Order at para. 4 (footnote omitted). The Commission indicated that all long form requirements would continue to apply. Unless these long form requirements are also waived (i.e., limited to CMRS interests or otherwise limited), then the reporting burden facing institutional investors such as pension funds holding indirect interests in a PCS applicant will be vastly magnified.



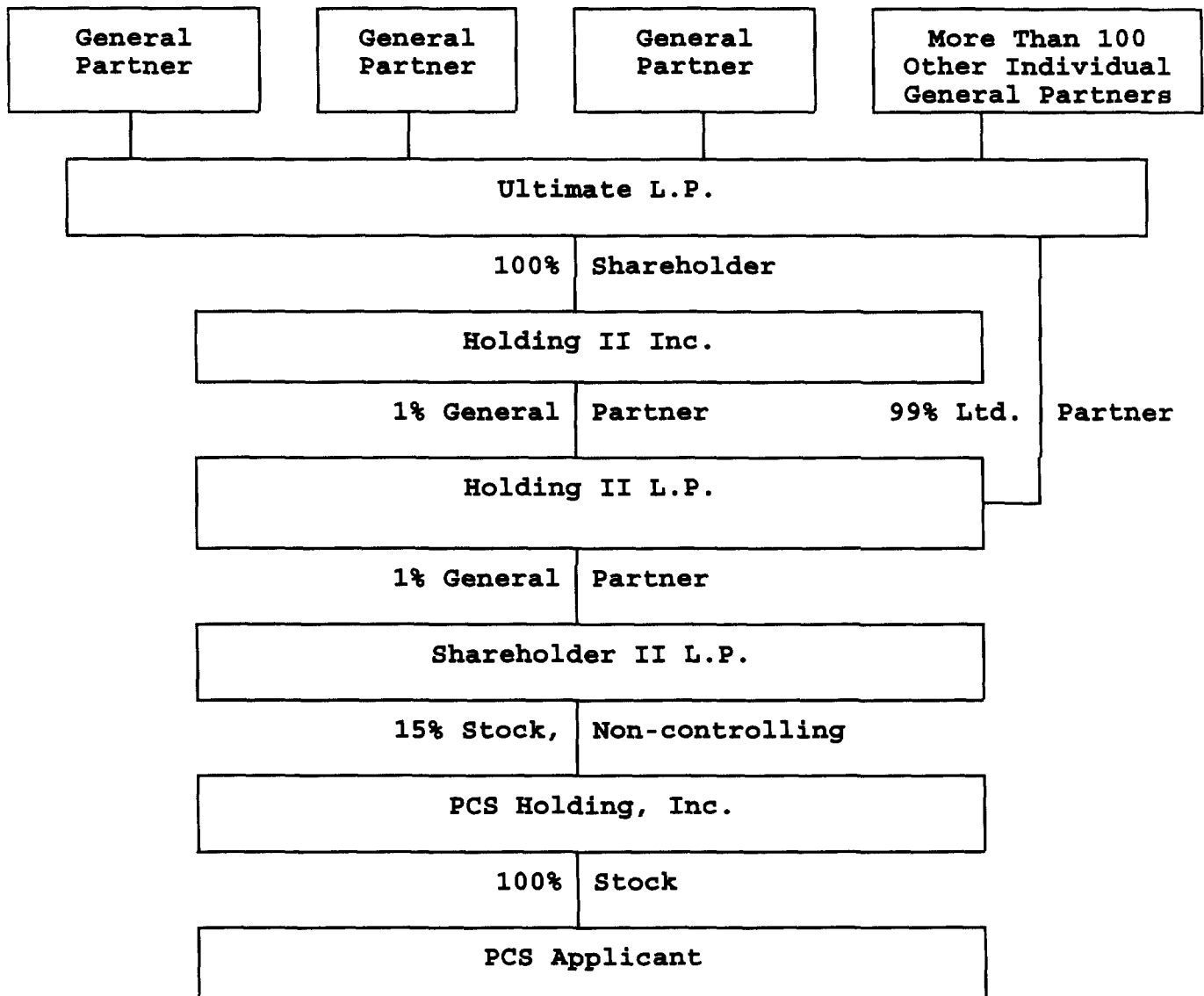
They, like the Morgan Stanley Partnerships, have numerous managers investing money on their behalf. In the case of indirect investments through limited partnership interests, all control over investment decisions (and, accordingly, any ability to exert influence over the licensee) is held by the general partner(s) of these partnerships. These pension funds do not and, indeed, probably could not keep track on a day to day basis of their indirect investments, whether in PCS, other CMRS, or otherwise. Furthermore, because these pension funds have no input over either the investment decisions of Shareholder I L.P. or the operations and policies of PCS Applicant, application of spectrum caps based on an indiscriminate use of the multiplier will do nothing to serve the Commission's goals of promoting vigorous competition by preventing one person or entity from controlling excessive CMRS spectrum.^{4/} In fact, the reporting requirements are so burdensome and risks of inadvertent violation of spectrum caps so high that each pension fund has indicated that it will reduce its interest in PCS Applicant below attributable levels. This contemplated withdrawal of investment is diametrically opposed to the public interest in encouraging institutional investors to invest in small and medium sized firms and thereby promoting competition among a diverse group of PCS service providers.^{5/}

A second illustration of the unintended consequences of an indiscriminate application of the multiplier is presented by

^{4/} See Memorandum Opinion and Order, FCC 94-144, GEN Docket No. 90-314 (rel. June 13, 1994) at paras. 98 et seq.

^{5/} See Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd. 2348, 2349 at para. 4 (rel. April 20, 1994).

another shareholder of PCS Holding, Inc., namely Shareholder II L.P. The one percent general partner of Shareholder II L.P. is another limited partnership, whose one percent general partner is a corporation, all of whose stock is held by yet another limited partnership. The general partners of this limited partnership are a group of over 100 individuals who were principals in a large investment house at the time of the formation of Shareholder II L.P. Strict use of the multiplier would attribute an interest in PCS Applicant to each of these general partners, even though none of them has any degree of control over the policies or operations of PCS Applicant. The following chart illustrates the traceable de minimis interest in PCS Applicant held by each of these general partners, which in every case is a very small fraction of one percent:

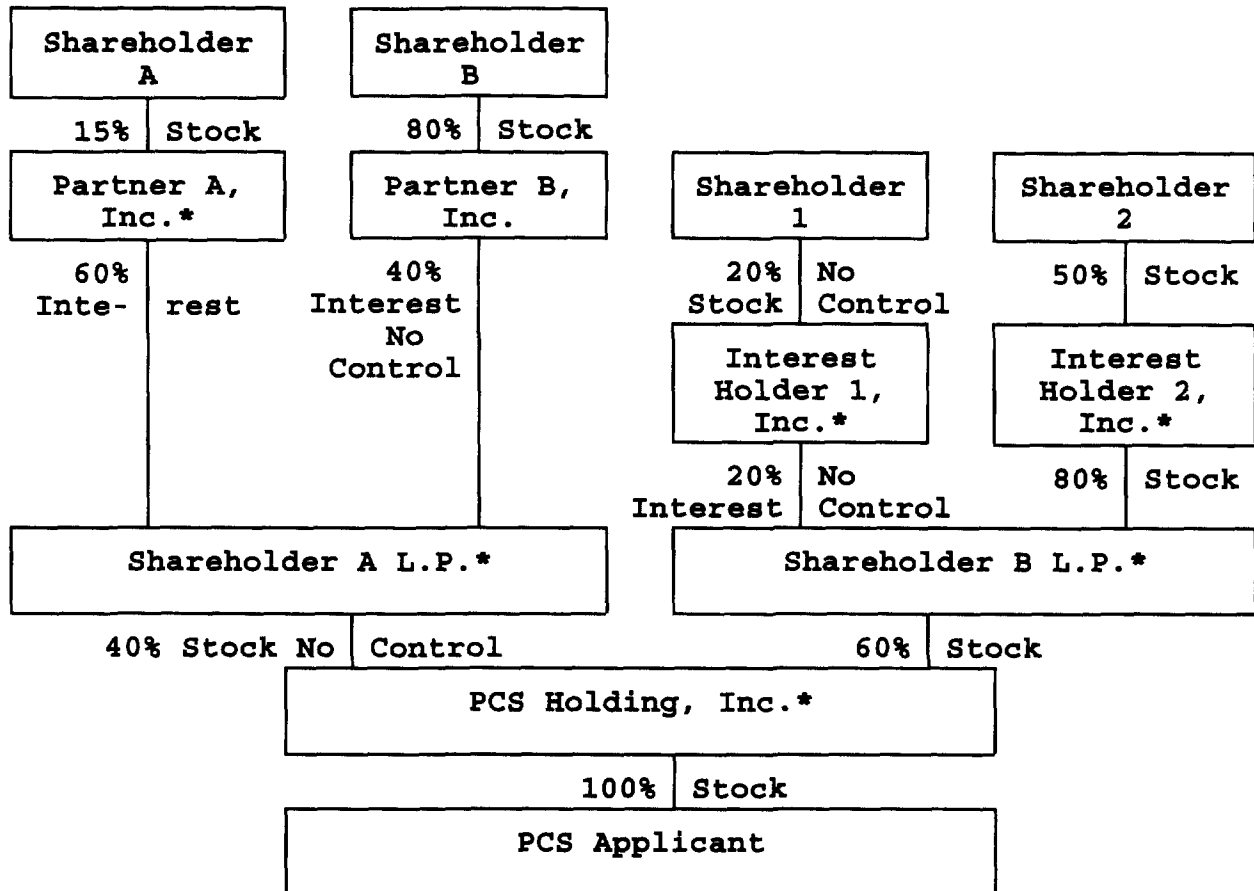


Despite the manifest lack of any influence over, and diluted financial stake in, the applicant, each of these general partners must painstakingly assemble data concerning any reportable interests in other relevant CMRS providers.^{6/} Furthermore, direct or indirect ownership interests of any of these general partners will subject them, and PCS Applicant, to violation of the spectrum aggregation rules. The Commission's goal of promoting competition among a diverse group of PCS service providers will be thwarted, not advanced, because this indiscriminate application of the attribution rules will cause companies like the brokerage house in our hypothetical (which is based on a real case) and others with similar ownership structures to avoid investing in PCS, in order to escape the reporting burdens and risk of violation of spectrum caps.

In view of the foregoing, it is requested that the Commission limit the use of the multiplier in the case of those persons or entities holding an interest in a five percent or greater shareholder of an applicant as follows: affiliates and subsidiaries must be listed and counted for spectrum cap purposes only in the case of those indirect interest holders who either (a) hold a majority of the ownership interests or other direct controlling interest in a holder of a direct attributable interest in the applicant or (b) have a direct attributable interest in an entity holding a direct controlling interest in the applicant. Thus, the multiplier would be limited to two steps; however, intermediate interest holders that are merely holding companies would not prevent attribution. This application of the multiplier is illustrated by the following chart:

^{6/} For purposes of the long form application, the current rules will require that each of these more than 100 people report their holdings in outside businesses of all kinds. The ill effects discussed above are much magnified by this more onerous requirement, which bears no relation to the Commission's stated purposes of the ownership disclosure requirements, namely:

to allow the Commission to determine who is the real party in interest, to determine compliance with the anti-collusion rules and ownership restrictions such as the multiple- and cross-ownership rules and the alien ownership restrictions.



* Attributable interest in PCS Applicant.

Starting at the bottom of the chart and working up, PCS Holding, Inc. would have an attributable interest because of its 100% stock interest in PCS Applicant. Shareholder A L.P. and Shareholder B L.P. would each be deemed to have direct attributable interests in PCS Applicant, because PCS Holding, Inc. is a holding company and thus does not count as one step of the multiplier. Partner A, Inc. has an attributable interest in PCS Applicant because (i) it has a controlling interest in Shareholder A L.P., which itself has an attributable interest in PCS Holding, Inc., and (ii) PCS Holding, Inc. is a holding company, and hence does not cut off extension of attribution to PCS Applicant. Partner B, Inc. does not have an attributable interest in PCS Applicant, however, because it has a non-controlling attributable interest in Shareholder A L.P., which has a non-controlling attributable interest in PCS Holding, Inc. Shareholders A and B would not have attributable interests in PCS Applicant, because the multiplier, limited as advocated herein, would not reach more than two tiers above PCS Holding, Inc. (because PCS Holding, Inc. is a holding company, Shareholder A L.P. would be deemed to have a direct

attributable interest in PCS Applicant). Interest Holder 1, Inc. and Interest Holder 2, Inc. would have attributable interests in PCS Applicant, because they have direct attributable interests in Shareholder B L.P., which has a direct controlling interest in PCS Holding, Inc. (because PCS Holding, Inc. is a holding company, Shareholder B L.P.'s interest would be deemed to be a direct controlling interest in PCS Applicant). Shareholders 1 and 2 would not have an attributable interest in PCS Applicant, because the multiplier would not reach more than two levels above PCS Holding, Inc.

As applied to the chart shown on Page 3, because Shareholder I L.P. and Shareholder II L.P. each holds an attributable but not a controlling interest in PCS Applicant pursuant to Section 24.204(d) of the Rules, then the pension funds or general partners described above would be deemed to have an attributable interest in PCS Applicant itself (for purposes of the reporting requirements of Sections 24.813(a)(1) and (a)(2) and the spectrum cap rules) only if any of them held a majority equity ownership interest or direct means of actual working control over Shareholder I L.P. or Shareholder II L.P., as the case may be. Otherwise, the pension funds and general partners would not have to disclose affiliates and subsidiaries or be subject to spectrum caps. Should one of PCS Applicant's shareholders have a controlling interest (as is the case with PCS Holding, Inc.), then persons with an attributable (controlling or non-controlling) interest in that controlling shareholder would be subject to the disclosure requirements of Sections 24.813(a)(1) and (a)(2) and the aggregation limits.

This limited application of the multiplier would have a true aim at those situations of real control and influence over a CMRS licensee. Indiscriminate application of the multiplier to reach persons and entities that do not seek and cannot exercise influence or control over a licensee would subject potential investors to burdensome disclosure requirements and risk of technical non-compliance with spectrum caps. Such an approach would serve no legitimate purpose, would thwart the Commission's goal of PCS ownership rules that are clear and easy to administer^{2/}, and would have the destructive effect of discouraging investment in PCS applicants by able and otherwise interested investors (as shown by the example of the pension funds' contemplated reduction of their investments) and thereby suppress rather than promote competition.

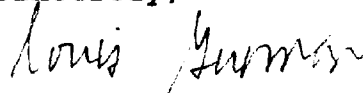
Because the broadband PCS auction for the MTAs has already commenced and the auctions for the BTAs are expected to begin promptly thereafter, and because the responses to the issues raised in this letter may affect the disclosure requirements imposed on PCS applicants and their bidding strategies, we request prompt

^{2/} Memorandum Opinion and Order, FCC 94-144, GEN Docket 90.314 (rel. June 13, 1994) at para. 117.

William E. Kennard, Esquire
December 16, 1994
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action. Two copies of this letter are provided. Kindly make this letter part of the public record in the above-referenced dockets.

Sincerely,

A handwritten signature in cursive script that reads "Louis Gurman".

Louis Gurman

cc: Rosalind K. Allen, Acting Chief, CRD-WTB
Donald H. Gips, Deputy Chief, OPP
Jonathan V. Cohen, Esquire
Phillip L. Spector, Esquire